PETITION FOR WRIT OF CERTIORARI

FILED

No. 941415 FEB 21 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HENRY W. M. IMMANUEL,

Petitioner,

v.

SHARON PRATT KELLY DIXON, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Respondent has demonstrated that the statutory scheme for the public release of certain information set forth in the Unclaimed Property Act, D.C. Code 42-201 et seq violates the District of Columbia's Freedom of Information Act (FOIA) D.C. Code 1-1524(a)(6) 1981 in that it allows the District of Columbia to exercise discretion to determine whether to release information.

TABLE OF AUTHORITIES CITED

CASES PAGE

National Parks & Conservation
Ass'n v. Morton, 498 F 2d 765
(D.C. Cir. 1974) 7

Washington Post v. Minor Bus.
Opp. Com'n, 560 A2d 517 (1989) 7

Newspaper Inc., v. Metro Pol.
Department, 546 A2d 9001 (1988) 7

Barry v. Washington Post Co.
529 A2d 319 (1987) 7

Dunhill v. Director, District
of Columbia Dept. of Transp.
416 A2d 244 (1980) 7

Aronson v. IRS.,973 F2d 962,
966 (1992) 8

STATUTES

District of Columbia Freedom of Information Act § 1-1524(a)(6)

Disposition of Unclaimed Property Act (1981) § 42-201

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS.

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

CONCLUSION 12

INDEX TO APPENDICES

Appendix A. Opinion of the Court of Appeals, for the District of Columbia.

Appendix B. Opinion of the Superior Court for the District of Columbia.

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1995

HENRY W.M. IMMANUEL
PETITIONER

VS.

SHARON PRATT KELLY-DIXON, et al,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Petitioner, Henry W.M. Immanuel, respectfully prays that a writ of Certiorari issue to review the Judgment and opinion of the Court of Appeals in the District of Columbia refusing the release of certain information set forth in the Unclaimed Property Act, D.C. Code 42-201 et seq pursuant to the Freedom of Information Act (FOIA).

OPINIONS BELOW

The unpublished opinion of the Court of Appeals in the District of Columbia appears in Appendix A to this Petition. The unpublished written of the Superior Court for the District of Columbia appears in Appendix B to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on January 11, 1994. The Court of Appeals denial of the petition for hearing was issued on November 11, 1994 and is set forth in Appendix C . The Court's jurisdiction is invoked under Title 28, U.S.C. 1254 (1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. 522 (b)(4) 1988

STATEMENT OF THE CASE

On June 16, 1993, petitioner requested by letter, from the D.C. Treasurer pursuant to the Freedom of Information Act requirements of the District of Columbia Code, Volume 2, Title 1 (1981) Section

1-1527, disclosure of those persons for whom, the District was holding monies and the amount of property involved. Petitioner received no response to his request. Respondent maintained that they did not respond to the request since it was routed to the wrong office, and that Petitioner was wrongfully informed and that none of his requested information could be disclosed. Respondents later stated that the later request was properly rerouted to the correct office and that Petitioner was provided those portions of the requested information to which he was entitled, i.e, the name and last know address of the property owners.

On June 7, 1993 Petitioner filed a Complaint in the Superior Court for the District of Columbia requesting information on the nature of the assets held by Respondent. Judge Ellen Segal Huvelle issued her order on December 16, 1993, dismissing Petitioner's Complaint.

On January 11, 1994 Petitioner filed a notice of Appeal, in the District of Columbia Court of Appeals. The District of Columbia Court of Appeals issued their order dismissing Petitioners complaint.

REASONS FOR GRANTING WRIT

Certiorari should be granted for the following reasons: In 1974 National Parks and Conservation Association v. Morton, 498 F.2d 765, this Court enumerated a two prong test for determining whether financial or commercial information in a government's possession should be treated as confidential. The Court stated that financial information will be given confidential protection if "(1) impair (s) the governments ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."

Criteria two is moot in the instant case as the information requested by petitioner is information concerning private individuals and is not related to businesses, corporation and or trade secrets.

Criteria one, was never met by respondent, nor was its threshold ever attempted to be satisfied. Respondent merely raises the specter of confidentiality, without making any showing of that release of the information would halt or even attenuate the assets and resulting information obtained pursuant to the Unclaimed Property Act, D.C. Code 42-231.

SUMMARY OF ARGUMENT

The Freedom of Information Act (FOIA) is to be generously construed in favor of access and narrowly construed when exemptions are claimed. The FOIA provides in 1-1524 (a)(6) a means for exempting information under the Districts Disposition of Unclaimed Property Act 42-201 et.seq. 1-1524 (a)(6)(A)(B) states that information may be exempted from disclosure by statute provided that: (A) the exemption requires no discretion or, (B) "Establishes particular Criteria to have information withheld."

Any exemption carved out under the Unclaimed Property Act, D.C. Code 42-402 et seq. (1981) must fulfill the requirements of 1-1524 (a) (6).

The confidentiality provision of the Disposition of Unclaimed Property Act is section 42-231. Section 42-231 states that information shall not be disclosed except to those who "furnish the same" and as provided in Section 42-218 and 42-223. It is Section 42-218 and 42-223 that are discretionary and prejudicial to prospective claimants.

Initially, a petitioner for unclaimed property will assert his claim for abandoned property against a holder who has reported possessing such property to the Mayor. Section 42-218. The holder may or may not decide in favor of a petitioners claim, however, if the holder decides against petitioner the holder will not be enriched by keeping the property, but, will have to remit all property, to the Mayor. Section 42-218 (e). It should be noted that, although a holder has no self interest in denying a petitioners claim, no criteria is ever stated as to what differentiates a "satisfactory proof claim" from an unsatisfactory proof claim.

Once property has been remitted from the Original holder to the Mayor pursuant to Section 42-218 (e), the Mayor determines the validity of all claims. With no criteria ever stated, the Mayor must make a distinction between those petitioners possessing valid claims from invalid claims. If the Mayor denies a petitioners claim and no other valid claim exist, as determined by the Mayor, the Mayor keeps the property. If is this endemic bias and self interest on the part of the Mayor, absent any criteria, which makes this Act

unconstitutional pursuant to FOIA 1-1524(a)(6).

ARGUMENT

I. THE FREEDOM OF INFORMATION ACT IS TO BE GENEROUSLY CONSTRUED IN FAVOR OF ACCESS AND NARROWLY CONSTRUED WHEN EXEMPTIONS ARE CLAIMED.

The District of Columbia clearly has a policy that favors disclosure. The Code itself, Section 1-1521, states that the Act should be "View(ed) toward expansion of public of access".

Case Law from The District of Columbia has fully and unambiguously corroborated the above stated policy. Washington Post v. Minor Bus. Opp. Com'n. 560 A2d 517 (1989). Newspapers Inc., v. Metro Police Department 546 A2d 9901 (1988). Barry v. Washington Post Co. 529 A2d 319 (1987). Dunhill v. Director, District of Columbia Dept. of Transp. 416 A2d 244 (1980).

The Case Law favoring disclosure in the District of Columbia is so replete and compelling that is understandable why Defendants had to go to such far off jurisdictions as Oklahoma and Massachusetts and

exhume tax cases to substantiate their position.

Further, it is interesting to note that in the case of Aronson v. I.R.S. 973 F2d 962, 966 (1992) the court goes to great lengths to distinguish between a standard FOIA request and a request for tax information. "In the tax, statute, however, Congress had decided that, with respect to tax returns, confidentiality not sunlight, is the proper aim". The instant case is not a tax law case and certainly doesn't involve tax returns.

Finally, The Honorable Ellen Segal Huvelle, in her Order of December 16, 1993 agreed that "plaintiff correctly argues that the FOIA favors disclosure".

ARGUMENT

II. The Unclaimed Property Act, D.C. Code 42-231 does not apply as a statutory exemption pursuant to the Freedom of Information Acts 1-1524 (a)(6).

The FOIA provides in 1-1524(a)(6):

(a) The following information may be exempt from disclosure under provisions of this title:....

(6) Information specifically exempted from disclosure by statue (other than this section), provided that such statute:

(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Unclaimed Property Act provides in D.C. Code 42-231, Any information required to be furnished to the Mayor as provided in this Chapter shall be confidential and shall not be disclosed to any person except the person who furnished the same to the Mayor and except as provided in 42-218 and 42-223 or as may be necessary in proper administration of this Chapter alone. Section 42-218 (b) requires the Mayor to publish the names and last known addresses of "persons appearing to be owners of abandoned property" 42-218 (b)(3) requires the owner to establish proof of ownership to the "holders satisfaction". It should be noted, pursuant to Section 42-202 (10) that a holder means any person who is organized or domiciled: A)

in possession of property belonging to another; B) who is a Trustee in a case or trust; or C) who is indebted to another person in an obligation.

Mayor as defined by D.C. Code Section 42-202 (14) means the Mayor of the District Columbia or the Mayors authorized agent. The code does not specifically authorize the Mayor to be a holder or the holder to be a Mayor, they are delineated as separate entities. Pursuant to Section 42-218 Notice of Abandoned Property (B)(3) a holder has to make the determination of the validity of any potential owners claim. No where in the Disposition of Unclaimed Property Act Section 42-201 et.seq. is there mentioned a criteria for any holder to determine the validity of any petitional claim. The holder is left up to his own internal and subjective criteria. It is important to note, however, that the original holder ultimately has no self interest in maintaining possession of abandoned property because pursuant to Code as stated in Section 42-218 (b) (3) any holder who is possession of abandoned property is required to remit that same property over to the Mayor. The holder simply has no

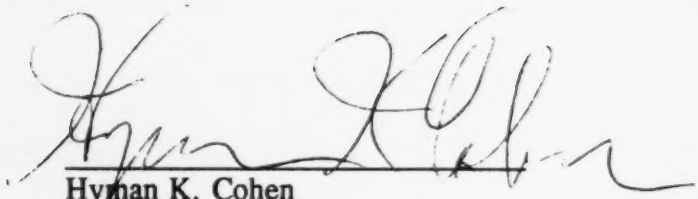
incentive to maintain the abandoned property because in time and as stipulated by statute, he will have to revert the property to the Mayor. When property is turned over to the Mayor pursuant to Section 42-218 (b)(3) it is now up to the Mayor to make a determination of the claim Pursuant to Section 42-225. The D.C. Code simply does not provide a criteria for determining who has a valid claim from those who do not have a valid claim. No where in the D.C. Code Section 42-201 et.seq. is there a criteria or a listing of elements necessary to quantify objectively what is a valid claim. Potential claimants are left to guess the Mayor's unknown criteria. Further, no one knows if the Mayor's criteria is the same as the original holders. Pursuant to the D.C. Code the Mayor is garnering property from a myriad of sources; banks, insurance companies, and real property. All of these sources have their own unique standards for determining claims. Has the Mayor simply assumed the original holders standard or has he implemented a uniform standard which may be greater than the original standard implemented by the holder? Clearly, the Mayor is exercising his own subjective standard

in determining the validity of claims. More importantly, however, the Mayor, unlike the original holder, has a self interest in denying claims. Section 42-223 (a) provides " the remainder percentage of funds received and any income or increment to the funds deposited in the trust fund accruing during such two years may be deposited in the general fund of the district." If the Mayor denies a petitioners claim and no other valid claim exist, as determined by the Mayor, the Mayor keeps the property. This scenario is not only fraught with prejudice against potential claimants, but is unconstitutional pursuant to the Freedom of Information Act 1-1524 (a) (6).

CONCLUSION

This Court should reverse Judge Huvelle's entry of Summary Judgment for the defendants and grant Plaintiff's request for name, address and property descriptions reported to the Mayor pursuant to Section 42-217.

Respectfully submitted



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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 94-CV-29

Henry W. M. Immanuel, Appellant,

v. CA-6324-93

Sharon Pratt Kelly, et al, Appellees.

Appeal from the Superior Court of the

District of Columbia

Civil Division

(Hon. Ellen Segal Huvalle, Trial Judge)

(Submitted November 16, 1994)

(Decided November 21, 1994)

Before Farrell and King, Assoc. Judges and Mack, Senior Judge

MEMORANDUM OPINION AND JUDGMENT

The Order dismissing appellant's complaint seeking information under the District of Columbia Freedom of Information Act (FOIA), D.C. Code § 1-1521 et seq., is affirmed essentially for the reasons stated by the trial judge. The information appellant seeks is barred

from disclosure by the confidentiality provision of the District of Columbia Unclaimed Property Act, D.C. Code § 42-231, permitting disclosure only to the person who furnished the information and to persons "possessing an interest in the property" (§42-218(b)(2) -- a description that appellant does not fit. Hence the information falls within the FOIA's exemption from disclosure for "matters [required to] be witheld from the public in such a manner as to leave no discretion on the issue ... ." D.C. Code §1-1524(a)(6). Provisions elsewhere in the Unclaimed Property Act assertedly giving the Mayor discretion in deciding the validity of claims have no relevance to the release of information, which is governed by §42-231.

Affirmed.

For the Court:

/s/
William H. Ng,
Clerk

APPENDIX B

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

Henry W. M. Immanuel,
Plaintiff

v.

C.A. No. 93-6324
Judge Huvelle
Calendar 13

District of Columbia,
Defendant

ORDER

This matter is before the Court on defendant's Motion to Dismiss Plaintiff's Complaint and plaintiff's opposition thereto. Upon review of the pleadings, statutes and relevant law, this Court concludes that defendant's motion must be granted.

Plaintiff has requested certain information from the District of Columbia that falls under the statutory scheme set forth in the Unclaimed Property Act, D.C. Code, Section 42-201 et seq. (1981). Specifically he seeks to obtain the names, addresses and amounts of money or property descriptions of abandoned property in the District. He makes this request pursuant to the District's Freedom

of Information Act (FOIA), D.C. Code Section 1-1521 et seq (1981). Specifically he seek to obtain the names, addresses and amounts of money or property descriptions of abandoned property in the District. He makes this request pursuant to the District's Freedom of Information Act (FOIA), D.C. Code Section 1-1521 et seq (1981).

The District has provided plaintiff only with the names and addresses that he has requested, claiming that the additional requested information is exempt from the requirements of the FOIA. The FOIA provides in Section 1-1524(a)(6):

> (a) The following information may be exempt from disclosure under the provisions of this title: . . .
>
> * * *
>
> (6) Information specifically exempted from disclosure by statute (other than this section), provided that such statute:
>
> > (A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
> >
> > (B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The Unclaimed Property Act provides in D.C. Code Section 42-231:

> Any information required to be furnished to the Mayor as provided in this chapter shall be confidential and shall not be disclosed to any person except the person who furnished the same to the Mayor and except as provided in Section 42-218 and 42-233 or as may be necessary in the proper administration of this chapter alone.

Section 42-218 requires the Mayor to publish the names and last known addresses of "Persons Appearing To Be Owners Of Abandoned Property." Those persons appearing to possess an interest in property may obtain "information concerning the amount or description" of such property from the Mayor. Under Section 42-223, before depositing funds resulting from the sale of abandoned property or from unclaimed life insurance policies, the Mayor is required to record the names and addresses of all persons entitled to any such property, as well as information regarding the unclaimed life insurance policies. All this information is available for public inspection. All information made available to the public under these two sections appears to have been released to the plaintiff by the District.

With respect to the additional information requested, plaintiff argues that the statutory scheme for the public release of certain information set forth in the unclaimed Property Act violates the requirements of the FOIA in that it allows the District to exercise discretion to determine whether to release information. To the contrary, the Court funds that the mandatory release of only names and addresses along with certain information on life insurance policies allows for no discretion whatsoever by the District and fully complies with the FOIA. 1/

Finally, plaintiff correctly argues that the FOIA favors disclosure. This policy has the effect of requiring that any ambiguities in FOIA exemptions be resolved in favor of disclosure. E.G. Washington Post Co. v. Minority Bus. Opportunity Comm., 560 A.2d 517 (D.C. 1989). The Court, however, finds no ambiguity in the provisions of the unclaimed Property Act. Certain information is exempt from disclosure under the FOIA, and the Court finds that the information requested in this instance falls within the statutory exemption.

Accordingly, it is this 15th day of December, 1993,

ORDERED that defendant's Motion to Dismiss is **GRANTED**, and plaintiff's complaint is **DISMISSED** with prejudice.

/s/
Ellen Segal Huvelle